SEP 19

No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
DOING BUSINESS AS SOUTHWEST AMBULANCE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Section 3345(b)(1) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption to the case.

Respondent SW General, Inc., d/b/a Southwest Ambulance, is a wholly owned subsidiary of Rural/Metro Corporation. Rural/Metro Corporation is a wholly owned subsidiary of American Medical Response, Inc., which is a subsidiary of Envision Healthcare Corporation. Envision Healthcare Corporation is a subsidiary of Envision Healthcare Holdings, Inc., a publicly held company (NYSE: EVHC). No other publicly held corporation owns 10% or more of Respondent's stock.

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STATEMENT

The Appointments Clause of the Constitution provides that "Officers of the United States" "shall" be nominated by the President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. Nevertheless, Congress has recognized that vacancies can occur unexpectedly and that the confirmation process takes time. Therefore, Congress has long given the President limited authority to designate acting officers to serve as temporary caretakers for vacant positions requiring Presidential appointment and Senate confirmation (so-called PAS positions). But in the decades leading up to the enactment of the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § 3345 *et seq.*, Presidents from both political parties used acting service to circumvent the advice-and-consent requirement altogether. Presidents directed their chosen replacements to perform the functions of a vacant PAS position in an acting capacity—often for years at a time. Congress enacted the FVRA to reclaim its constitutionally mandated role in the appointments process.

When a PAS officer dies, resigns, or is otherwise unable to perform his duties, the FVRA authorizes an individual from among a specified pool to serve temporarily as an acting official until the Senate confirms a permanent replacement. Section 3345(a)(1) sets forth an automatic-succession rule: The first assistant to the vacant office "shall" become the acting officer. *Id.* The President may override this self-executing rule by directing an individual already holding a different PAS office within the government, or a senior employee within the agency,

to serve as the acting officer. *See id.* § 3345(a)(2), (a)(3).

But Congress did not want the President to use acting service to evade the Senate's advice-and-consent role. Section 3345(b)(1) accordingly provides that "a person" who is nominated for a vacant PAS position requiring Senate confirmation "may not serve as an acting officer for an office under this section" unless he is a long-serving or Senate-confirmed first assistant. *Id.* § 3345(b)(1). Section 3345(b)(1)'s introductory clause—"notwithstanding subsection (a)(1)"—underscores the broad application of the words that follow it by making clear that the prohibition on acting service by nominees applies even when it conflicts with Subsection (a)(1)'s automatic mandate.

As the D.C. Circuit correctly explained, Section 3345(b)(1)'s language unambiguously applies to all acting officers.

A. The FVRA, Prior Vacancies Acts, And Their Constitutional Backdrop

1. The Senate's advice and consent provides an important check on the President's appointment power

The Appointments Clause provides a critical restraint on the President's power to unilaterally appoint officers of the United States. The Framers believed that such power was "the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991). The Constitution cabins that power by "dividing" it "between the Executive and Legislative Branches." *Id.* at 884. Thus, while the President alone has the

power to nominate officers of the United States, those individuals generally cannot assume office unless and until the Senate consents. *See* U.S. Const. art. II, § 2, cl. 2; *see also N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

This system of checks and balances has many virtues. By vesting the power of nomination in the President, the Framers sought "to assure a higher quality of appointments." *Edmond v. United States*, 520 U.S. 651, 659 (1997). "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." *The Federalist No. 76*, at 455 (Hamilton) (Clinton Rossiter ed. 1961). But the Framers also recognized that "a man who had himself the sole disposition of offices[] would be governed much more by his private inclinations and interests." *Id.* at 457. Requiring the President "to submit the propriety of his choice to the discussion and determination of a different and independent body"—the Senate—accordingly provides "an excellent check upon a spirit of favoritism in the President." *Id.* Moreover, the "joint participation of the President and the Senate" helps "ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660.

The Constitution recognizes only two exceptions to the advice-and-consent requirement. The first is the President's narrow power to make recess appointments. *See* U.S. Const., art. II, § 2, cl. 3. The second is Congress's discretion to "vest the appointment of ... inferior officers, as [it] think[s] proper, in the President alone, in courts of law, or in the heads of departments." *Id.* § 2, cl. 2.

2. Congress has long given the President *limited* authority to staff vacancies temporarily, without the need to obtain Senate approval

Despite the requirements of the Appointments Clause, Congress has given the President carefully circumscribed authority to appoint acting officials to fill vacancies temporarily without first obtaining the Senate's approval. But consistent with the structural safeguards of the Appointments Clause, the purpose of these temporary caretakers is to keep the government running during the confirmation process—not to allow the President to sidestep the Senate's approval of long-term officeholders. Thus, from their earliest iterations, acts authorizing temporary appointments have limited the types of positions that acting officials may fill, the circumstances in which they may do so, who may serve as an acting official, and for how long. Moreover, reflecting Congress's vigilance about its advice-and-consent role, whenever Congress has expanded the President's authority to appoint acting officials in some respects, it has constrained it in others.

a. The first statute authorizing acting service allowed the President to appoint "any person" to perform the duties of a vacant office. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. But it applied only to specified positions vacated for particular reasons (e.g., sickness or death). *See id.* Moreover, although Congress initially allowed an acting officer to serve until the permanent officeholder resumed his duties or a new one was appointed, *id.*, Congress promptly

amended the law to impose a six-month limit on acting service, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

b. In 1863, Congress both expanded and contracted the President's power to appoint temporary officials. *See* Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. The new law allowed the President to fill vacancies arising from an officer's resignation, not just sickness, death, or "absence from the seat of Government." *Id.* It also covered vacancies in additional positions. *Id.* In return for this added flexibility, Congress stripped the President of the ability to appoint anyone he wanted as an acting official; under the new law, acting officials could only be already-appointed officers in an Executive Department. *See id.*

c. Five years later, Congress passed the Vacancies Act. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168-69. This new law, which repealed all earlier laws addressing vacancies, became the exclusive authority for temporarily assigning the duties of a vacant office. *See id.* § 4. The Vacancies Act allowed temporary appointments to more positions than its predecessors. *Id.* §§ 1-2. It also redefined the pool of eligible acting officials to include the "first or sole assistant" to the vacant office and officers already holding different PAS positions within the government. *Id.* §§ 1-3.

At the same time, however, Congress imposed a significant new limit on the President's authority. The Vacancies Act reduced the permissible time for acting service from six months to a mere ten days. *See id.* § 3. Congress determined that the preexisting six-month limit was "an unreasonable length of time"

to allow the President to "suppl[y] ... vacancies ... without submitting [a nomination] to the Senate." Cong. Globe, 40th Cong., 2d Sess., 1163 (1868) (statement of Sen. Trumbull). "[V]acancies ought to be filled just as quick as the President can have reasonable time to turn round and fill them," and "ten days would be enough." *Id.* (statement of Sen. Fessenden).

With the exception of an amendment almost a quarter-century later increasing the permissible length of acting service from ten to 30 days, the Vacancies Act remained largely unchanged for the next 120 years. *See* Act of Feb. 6, 1891, ch. 113, 26 Stat. 733; Pub. L. No. 89-554, 80 Stat. 424, 425-26 §§ 3345-3349 (1966) (recodifying title 5); *see* S. Rep. No. 89-1380, at 20, 70-71 (1966).

d. Following the significant growth of the administrative state and the number of PAS positions in the mid-twentieth century, the Executive Branch began flouting the Vacancies Act's requirements. *See* Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 17-19 (Jan. 14, 1998) (*CRS Validity Memo*) (exhibit to *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 62-100 (1998) (*Vacancies Act Hearing*)). Many agencies believed that the Act's 30-day time limit was "such a ridiculously short moment of time" that "it could not possibly apply to them." *Vacancies Act Hearing* 182. They claimed that other, agency-specific statutes provided alternative avenues for filling vacancies. *See CRS Validity Memo* 17-19.

For example, the Department of Justice (DOJ) argued that the Attorney General's authority to delegate duties within the Department included the authority to fill vacancies with whomever he wanted, for however long. *See id.* (discussing similar positions of HHS, Education, and Labor Departments); *see also Vacancies Act Hearing* 11, 116-17.

After decades of disregard by the Executive Branch, Congress responded in 1988 by making two key changes designed to "revitalize the Vacancies Act." S. Rep. No. 100-317, at 14 (1988). *First*, Congress extended the Act's time limit from 30 to 120 days, and tolled this period while a nomination was pending. *See* Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988); S. Rep. No. 100-317 at 23. "By giving more leeway to the President to find a nominee and tying the time limitation on 'actings' to the prompt forwarding of nominations, the Committee believed it made more effective and clear the Section 3349 declaration that the Act's provisions are the sole means for filling vacancies in covered agencies." *Vacancies Act Hearing* 177; *see also* S. Rep. No. 100-317 at 14. *Second*, Congress eliminated any remaining doubt about the Vacancies Act's scope by amending it to refer explicitly to executive agencies. *See* Pub. L. No. 100-398, § 7(a), 102 Stat. at 988; S. Rep. No. 100-317 at 14, 23.

3. In the years leading to the FVRA's enactment, Presidents from both parties circumvent statutory restrictions on temporary officials

These changes to the Vacancies Act were not enough. Presidents from both political parties continued to use acting service to put their chosen replacements to work immediately and for lengthy periods, without obtaining the Senate's approval.

This problem manifested itself in numerous ways. Some administrations maintained that the Vacancies Act was inapplicable to certain agencies. *See Vacancies Act Hearing* 128-31; *see* S. Rep. No. 105-250, at 3 (1998). And Presidents from both parties continued to staff vacant positions without regard to the Act's time limit. By the late 1990s, approximately 20% of PAS positions in Executive departments were being filled by "temporary designees, most of whom had served well beyond the 120-day limitation period of the [Vacancies] Act without presidential submissions of nominations." Morton Rosenberg, Cong. Research Serv., CRS-98-892 *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 1 (1998); *see* S. Rep. No. 105-250 at 5.

The most egregious offender was DOJ. As of May 1997, "almost all of the top positions at the Justice Department were being filled in an acting capacity." 144 Cong. Rec. 22,515 (daily ed. Sept. 28, 1998) (statement of Sen. Thurmond). Many of these acting officials served for years before the President submitted a nomination. *See* S. Rep. No. 105-250 at 3 (Acting Solicitor General served for over a year before

any nomination was submitted); 144 Cong. Rec. 22,515 (statement of Sen. Thurmond) (Acting Assistant Attorney General of the Criminal Division served for two and a half years before any nomination was submitted); *see also* 144 Cong. Rec. 22,508-22,509 (statement of Sen. Thompson) (Acting Director of Office of Thrift Supervision (OTS) "served for 4 years without a nomination for the position ever having been submitted to [the Senate]").

In at least one instance, an acting official served for years, even after the Senate *rejected* his nomination repeatedly. After the Senate refused to confirm Bill Lann Lee as Assistant Attorney General of the Civil Rights Division, the President installed him as the acting officer for the position. *See* The White House, Office of the Press Secretary, "Remarks by the President at Announcement of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights," 1997 WL 770918 (Dec. 15, 1997) (*Lee Press Release*). President Clinton explained, "I have done my best to work with the United States Senate in an entirely constitutional way," but "we had to get somebody into the Civil Rights Division." *Id.* at *4. "I can't wait for him to go to work." *Id.* at *5.[1]

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[1] President Clinton unsuccessfully nominated Lee twice more. *See* The White House, Office of the Press Secretary, "President Clinton Names Bill Lann Lee as Assistant Attorney General for Civil Rights at the Department of Justice," 2000 WL 1071925 (Aug. 3, 2000). Finally, on August 3, 2000—after Lee had performed duties in an "acting" capacity for more than two and a half years—President Clinton appointed him to the position under the Recess Appointments Clause. *Id.*

Lee's acting service flouted the Vacancies Act and threatened the Senate's advice-and-consent role in several respects. The Act's 120-day limit for acting service had expired long before Lee began his acting service. In fact, a different acting officer had already out-served that time limit by more than 60 days. *See CRS Validity Memo* 2. Moreover, because the Senate had rejected Lee for the permanent position, his appointment as acting officer contravened the Vacancies Act's restriction on acting service by failed nominees. *See* Pub. L. No. 100-398, § 7(b), 102 Stat. at 988. On top of these violations, Lee (a private-sector employee) was not eligible to serve as an acting officer at all until the Administration named him "first assistant" to the Assistant Attorney General—a decision made the morning that Lee began his acting service. *See CRS Validity Memo* 2. These combined problems exemplified the widespread disregard of the Vacancies Act, which allowed a President's ultimate choice for a PAS position to serve in a long-term acting capacity without the Senate's consent.

Finally, the D.C. Circuit's decision in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), made matters worse. Although the Acting Director of OTS had served improperly for four years, the court upheld his actions because a properly appointed officer subsequently ratified them. *See id.* at 205, 214. *Doolin* thus underscored that the Vacancies Act had become toothless. *See* S. Rep. No. 105-250 at 8.

4. Congress enacts the FVRA to reclaim its role under the Appointments Clause

By 1998, Congress was alarmed that long-term acting officials were running the Government without the Senate's advice and consent. *See generally Vacancies Act Hearing*. This scheme "obliterate[d]" the premise of the Appointments Clause, that only Senate-confirmed officials should carry out important government functions. S. Rep. No. 105-250 at 7. Congress enacted the FVRA to stop these Executive "runaround[s] of" the Appointments Clause. 144 Cong. Rec. 22,517 (statement of Sen. Byrd); *see* S. Rep. No. 105-250 at 5.

a. After "months" of thorough study, a bipartisan group of Senators proposed a comprehensive new framework for appointing temporary officials. 144 Cong. Rec. 22,512 (statement of Sen. Byrd).

The initial draft of the FVRA constrained the President's power to staff vacancies by extinguishing an acting officer's authority if a nomination was not submitted within 150 days of the vacancy. *See* S. 2176, 105th Cong., 2d Sess. 3, 7; S. Rep. No. 105-250 at 14. Congress encouraged the President to submit timely nominations by extending that time limit when a nomination was pending. *See* S. 2176 at 4; S. Rep. No. 105-250 at 14.

The initial statutory draft also allowed only first assistants and individuals already holding PAS positions to serve as acting officers. *See* S. 2176 at 2-3. And even first assistants became ineligible to serve as acting officers if the President nominated them for the permanent position (unless they had

served as the first assistant for at least 180 days before the vacancy arose). *See id.* at 3.

Finally, in contrast to the Vacancies Act, the proposed legislation imposed consequences for violating these requirements. It provided that actions taken in violation of the statute "shall have no force or effect" and "may not be ratified." *Id.* at 9-10. Together, these provisions were designed to "create an incentive for the President to submit a nomination," and to ensure that "constitutionally mandated procedures ... [are] satisfied before acting officials may serve in positions that require Senate confirmation." S. Rep. No. 105-250 at 8, 14.

b. A few Senators expressed concern that the proposed FVRA went too far in constraining the President. They said that the 150-day limit on acting service was "too rigid" in light of the increasingly lengthy confirmation process. *Id.* at 35-36 (minority views). They also stated that the pool of eligible acting officials should include senior agency employees. 144 Cong. Rec. 22,519 (statement of Sen. Glenn); *see* 144 Cong. Rec. 22,514 (statement of Sen. Levin). Finally, they advocated shortening the 180-day time-in-service requirement for first assistants serving as both the acting officer and the nominee. 144 Cong. Rec. 22,519-20 (statement of Sen. Glenn); *see also* S. Rep. No. 105-250 at 31 (additional views).

c. Congress revised the FVRA to account for these concerns—but, as with earlier vacancy laws, it did so in a manner that preserved the Senate's advice-and-consent prerogative. In its final enacted form, Section 3345(a)(1) sets forth a rule of automatic succession: When a vacancy occurs, "the first

assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The President "may" override this automatic rule by "direct[ing]" either "a person who serves in [another PAS position]" within the Government, or a senior government employee (i.e., an employee who has worked for at least 90 days at a pay rate of GS-15 or higher) from the same agency, "to perform the functions and duties of the vacant office temporarily in an acting capacity." *Id.* § 3345(a)(2)-(3).[2]

In the course of expanding the pool of eligible acting officers to include the potentially thousands of GS-15 employees within an agency, Congress made other changes to avoid recreating the sort of problem that led to the FVRA in the first place, i.e., a loophole enabling the President to put his chosen replacement to work immediately and for a prolonged period without the Senate's approval. In particular, Congress revised Section 3345(b)(1) to impose additional restrictions on acting officers whom the President has nominated for permanent appointment. As noted, the initial draft bill prohibited newly appointed first assistants from serving as both the acting official and the nominee. *See* S. 2176 at 3.[3] In

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[2] In the context of certain Executive offices of a fixed term, the President also "may direct an officer who is nominated by the President for reappointment for an additional term to the same office ... without a break in service, to continue to serve in that office" while his nomination for reappointment is pending. 5 U.S.C. § 3345(c)(1).

[3] The unenacted language provided that a person whom the President has nominated for appointment "may not serve as an acting officer for an office under this section" if that person

the enacted law, Congress deleted language that restricted the application of Section 3345(b)(1) to first assistants.

Thus, Section 3345(b)(1) provides: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he either "did not serve in the position of first assistant" at all or "served in the position of first assistant" for less than 90 days. *Id.* § 3345(b)(1). In other words, despite Subsection (a)(1)'s automatic-succession rule, a nominee can serve as the acting officer only if he is an experienced first assistant. *See id.* Section 3345(b)(2) creates a further exception to the restriction on acting service by a nominee. It allows first assistants with less than 90 days of experience to serve as both the acting official and the permanent nominee if the first assistant position is itself a PAS position and "the Senate has approved the appointment of such person to such office." *Id.* § 3345(b)(2).

(continued...)

(1) "serves in the position of first assistant to such officer" on the date of the vacancy, and (2) has held that position for less than 180 of the past 365 days. S. 2176 at 3.

B. Proceedings Below

1. Lafe Solomon serves as Acting General Counsel of the NLRB in violation of the FVRA

This case arises from Lafe Solomon's service as Acting General Counsel of the NLRB.

Under the National Labor Relations Act (NLRA), the General Counsel of the NLRB must be appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). He has "final authority ... in respect of the investigation of charges and issuance of complaints" alleging unfair labor practices. *Id.*

In June 2010, Ronald Meisburg resigned as NLRB General Counsel. The President directed Mr. Solomon to serve as the Board's Acting General Counsel pursuant to Section 3345(a) of the FVRA. *See* Pet. App. 5a.[4] At that time, Mr. Solomon was not the first assistant to the General Counsel, and his prior position did not require Presidential appointment or Senate confirmation. Mr. Solomon did, however, satisfy the salary and experience requirements of the FVRA's senior government employee provision, 5 U.S.C. § 3345(a)(3), because he had been serving as the Director of the NLRB's Office

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[4] The President did not invoke the NLRA's alternative method for appointing a temporary Acting General Counsel, "perhaps because the FVRA allows an acting officer to serve for a longer period of time." Pet. App. 6a n.2 (citing 29 U.S.C. § 153(d)); *see* 5 U.S.C. § 3347(a)(1)(A) (FVRA does not override statutory provisions "expressly" authorizing the President to designate acting official); S. Rep. No. 105-250 at 16 (FVRA does not override appointment provision in NLRA).

of Representation Appeals for ten years. *See* Pet. App. 11a.

Six months later, on January 5, 2011, the President nominated Mr. Solomon to serve as NLRB General Counsel on a permanent basis. *See* Pet. App. 6a. The Senate did not act on that nomination, and it was returned to the President. *See id.* (citing 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013)). The President resubmitted Mr. Solomon's nomination on May 24, 2013, but ultimately withdrew it and nominated Richard Griffin, who was confirmed by the Senate on October 29, 2013. *See id.* Mr. Solomon served as Acting General Counsel from June 21, 2010, to November 4, 2013. *Id.*

2. While serving in violation of the FVRA, Mr. Solomon issues an unfair labor practice complaint against Respondent

In January 2013, while Mr. Solomon was serving as the NLRB General Counsel on an acting basis, an unfair labor practice complaint was issued against Respondent SW General, Inc. *See* Pet. App. 7a. The complaint alleged that Respondent violated the NLRA by unilaterally discontinuing annual bonus payments to certain long-term employees. *See id.* (citing 29 U.S.C. § 158(a)(1), (5)); Pet. App. 40a. Respondent argued that it fulfilled its obligations to make such payments under the collective bargaining agreement, and that it had no duty to make additional payments after that agreement expired. *See* Pet. App. 62a-63a. An administrative law judge (ALJ) disagreed. *See* Pet. App. 104a.

Respondent filed exceptions to the ALJ's decision. *See* Pet. App. 7a. In addition to contesting the ALJ's legal and factual findings, Respondent argued that the complaint was invalid because Mr. Solomon was serving as Acting General Counsel in violation of the FVRA. *See id.* The NLRB adopted the ALJ's recommended order without addressing Respondent's FVRA challenge. *See id.*; *see also* Pet. App. 31a-37a.

3. The D.C. Circuit unanimously dismisses the complaint because Mr. Solomon lacked authority to issue it

A D.C. Circuit panel comprising Judges Henderson, Srinivasan, and Wilkins vacated the NLRB's order. *See* Pet. App. 1a-30a. The court unanimously agreed with Respondent that the complaint was unauthorized because Section 3345(b)(1) rendered Mr. Solomon "ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel." Pet. App. 7a. Section 3345(b)(1), the court explained, "prohibits a person from being both the acting officer and the permanent nominee unless (1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant." Pet. App. 11a (citing 5 U.S.C. § 3345(b)(1)-(2)).

The court held that the FVRA makes clear that Section 3345(b)(1)'s prohibition applies to "all acting officers," not just those who assume their position under Subsection (a)(1). *See* Pet. App. 11a, 20a. Subsection (b)(1) begins: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if [certain

criteria are met]." 5 U.S.C. § 3345(b)(1). The term "a person," the court explained, is "broad" and "covers the full spectrum of possible candidates for acting officer." Pet. App. 12a. "And the phrase 'this section' plainly refers to section 3345 in its entirety"; it is not limited to Subsection (a)(1). *Id.* "Thus, the plain language of subsection (b)(1) manifests that no person can serve as both the acting officer and the permanent nominee (unless one of the exceptions in subsections (b)(1)(A) or (b)(2) applies)." Pet. App. 13a.

The court rejected the Government's contrary interpretation, which "focus[ed]" on the phrase, "[n]otwithstanding subsection (a)(1)." *Id.* The word "notwithstanding" means "in spite of," not "for purposes of" or "with respect to." *Id.* The "notwithstanding" clause therefore does not *restrict* "the ultimate scope of subsection (b)(1)." Pet. App. 14a.

In the face of the FVRA's "plain language," the court found the Government's reliance on contradictory floor statements and other legislative history unpersuasive. Pet. App. 17a. The court also noted that the FVRA's references to the first assistant in Sections 3345(b)(1)(A)(i) and 3345(b)(2)(A) would be unnecessary if Section 3345(b)(1) applied only to first assistants. *See* Pet. App. 15a-16a; *infra* 30-32.

"Because Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court held that he served in violation of the FVRA "from that date forward." Pet. App. 20a. After rejecting certain additional defenses by the Government, *see* Pet. App. 21a-22a, the court

dismissed the complaint and vacated the NLRB's order. Pet. App. 30a.

SUMMARY OF ARGUMENT

I. The text, structure, and purpose of the FVRA point to the same conclusion: Section 3345(b)(1)'s restriction applies to all acting officers.

Section 3345(b)(1) is clear and unambiguous: "[A] *person* may not serve as an acting officer for an office under *this section*" unless he can satisfy specific criteria. 5 U.S.C. § 3345(b)(1) (emphasis added). This language encompasses all acting officers. First assistants, PAS officials, and GS-15 agency employees are all "persons" serving under Section 3345. If Congress had intended to limit Section 3345(b)(1)'s requirement to first assistants, it could easily have said, "a first assistant serving under Subsection (a)(1)." Indeed, Congress was precise in its use of internal cross-references throughout the FVRA. And other provisions of the statute confirm that Congress knew how to refer to a subset of acting officers when it wanted to do so.

Section 3345(b)(1)'s introductory clause—"notwithstanding subsection (a)(1)"—underscores the broad application of the words that follow it. That clause makes clear that Subsection (b)(1)'s prohibition applies even when it conflicts with Subsection (a)(1)'s automatic-succession rule. But the "notwithstanding" clause does not mean that Subsection (b)(1) applies *only* to first assistants serving under Subsection (a)(1). Indeed, the word "notwithstanding" means "in spite of"—not "for purposes of" or "with respect to." Congress used the phrase "notwithstanding subsection (a)(1)" elsewhere

in Section 3345 according to this ordinary meaning—to override conflicting provisions, rather than to limit the words that follow. It plays the same role in Subsection (b)(1). Moreover, that reading avoids creating superfluity in the surrounding text.

Reading Section 3345(b)(1)'s prohibition to apply to all acting officers is consistent with the FVRA's purpose and history; it also comports with the background constitutional principle that Officers of the United States require Senate confirmation. In the years leading to the FVRA's enactment, Presidents from both parties had been directing their chosen replacements to serve as acting officers for prolonged periods without obtaining the Senate's approval. Congress enacted the FVRA to solve that problem. The FVRA does recognize the need for flexibility during a vacancy by allowing the President to choose from a broad pool of acting officials (first assistants, PAS officers, and senior agency employees) who may serve throughout the potentially lengthy process of confirming a permanent officeholder. But precisely because of this flexibility, Congress did not want the President's *chosen nominee* to get to work immediately under the guise of acting service. That would resurrect the very problems the FVRA was enacted to address.

II. The Government nevertheless claims that Section 3345(b)(1)'s broadly worded prohibition applies only to first assistants.

The Government construes the clause "notwithstanding subsection (a)(1)" to mean that Subsection 3345(b)(1)'s prohibition applies only "for purposes of" or "with respect to" first assistants

serving under Subsection (a)(1). But that is not what "notwithstanding" means. The Government cites no authority supporting its atextual reading of a term that Congress consistently uses according to its proper meaning, including elsewhere in Section 3345. Moreover, critical differences between Subsection (a)(1) and Subsections (a)(2)-(3) justify Congress's decision to single out Subsection (a)(1) in the "notwithstanding" clause. Subsection (a)(1) creates a self-executing rule: The first assistant "shall" serve as the acting officer when a vacancy arises. Subsection (b)(1) starkly conflicts, by saying that some first assistants "may not" do so. The "notwithstanding" clause resolves that conflict. By contrast, Subsection (b)(1) does not conflict with Subsections (a)(2)-(3) in the same way. The latter are permissive provisions that grant the President discretion, which Subsection (b)(1) then delineates. Congress frequently confers discretion in one subsection and cabins it in another. No "notwithstanding" clause is necessary to harmonize these provisions.

The Government next looks to the FVRA's history and purpose for support, but that background confirms Respondents' reading of Section 3345(b)(1). The sole piece of legislative history that even remotely supports the Government's view is a single sentence uttered on the Senate floor, which another sponsor of the FVRA quickly contradicted.

Finally, the Government claims that the Executive Branch has rewritten Section 3345(b)(1) by disregarding it for the past 18 years. That is not, of course, how statutes are amended. In any event, the Executive Branch's past reading of the FVRA is not

entitled to any deference. The Government relies heavily on conclusory statements that OLC and GAO issued without any analysis, but it appropriately does not suggest that those interpretations warrant *Chevron* deference. And while the Government claims that the Senate has acquiesced to its approach, it cites no evidence that the Senate was even aware that some acting officials served in violation of the FVRA while their nominations were pending, much less that Congress approved of the Executive Branch's interpretation of the statute.

ARGUMENT

I. SECTION 3345(b)(1)'S PROHIBITION APPLIES TO ALL ACTING OFFICERS

Section 3345(b)(1)'s prohibition on acting service by a permanent nominee applies to "a person" serving as an acting officer "under this section"—i.e., all acting officers serving under Section 3345. The introductory clause, "notwithstanding subsection (a)(1)," underscores the broad application of this language by making clear that it even overrides Section 3345(a)(1)'s conflicting automatic-succession rule.

This interpretation is consistent with the surrounding text, the legislative history, and background constitutional principles, all of which point to the same conclusion: Congress did not want the President's chosen nominee to begin performing the duties of a vacant PAS office before the Senate approved.

A. Section 3345(b)(1)'s Language Is Clear

1. As both the D.C. and Ninth Circuits explained, "[t]he first independent clause of subsection (b)(1) is the clearest indication of its overall scope." Pet. App.

12a; *see Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558-59 (9th Cir. 2016). That clause states that "*a person* may not serve as an acting officer for an office under *this section*." 5 U.S.C. § 3345(b)(1) (emphasis added). The broad term "person" naturally includes "the full spectrum of possible candidates for acting officer." Pet. App. 12a; *Kitsap*, 816 F.3d at 558. "And the phrase 'this section' plainly refers to section 3345 in its entirety." Pet. App. 12a; *Kitsap*, 816 F.3d at 558. If Congress had intended Subsection (b)(1) to apply only to Subsection (a)(1), "it would have said 'first assistant' and 'that subsection' [or 'subsection (a)(1)'] instead of 'a person' and 'this section.'" Pet. App. 12a-13a; *see Kitsap*, 816 F.3d at 559.

Section 3345(b)(1)'s introductory, dependent clause—"notwithstanding subsection (a)(1)"—does not narrow the broad reach of the categorical words that follow it—"person" and "section." The "notwithstanding" clause "simply means that (b)(1)'s limitations control, even to the extent that (a)(1)'s automatic directive that first assistants 'shall' serve in an acting capacity may conflict with those limitations." *Kitsap*, 816 F.3d at 559; *see* Pet. App. 13a-14a. But "[n]othing about this textual construction indicates that (b)(1) applies *only* to (a)(1)." *Kitsap*, 816 F.3d at 559. And the other language in Section 3345(b)(1) clearly encompasses all acting officials.

2. Sound authority supports this analysis of the FVRA. Courts interpret words according to "their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). And

the ordinary meaning of the words Congress used in Section 3345(b)(1) includes all acting officers.

a. The term "a person" has a broad and inclusive scope. The Dictionary Act defines "person" to include "individuals." 1 U.S.C. § 1. Dictionaries similarly define "person" as "a human being." *E.g.*, Black's Law Dictionary 1142 (6th ed. 1990). And this Court likewise has recognized "the all-inclusive nature of the term 'person.'" *Jefferson Cnty. Pharmaceutical Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 156 (1983); *see also Pfizer v. Gov't of India*, 434 U.S. 308, 312 (1978). Finally, because the modifier "a" has a "generalizing force," Black's Law Dictionary 1477, the phrase "a person" is all-encompassing. *Cf. Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000) (changing "modifier 'a' to 'any'" does not alter meaning of "person").

Applying these principles, this Court held that Title IX of the Education Amendments of 1972, which provides that "[n]o person" shall be discriminated against based on gender, 20 U.S.C. § 1681(a), protects not only students, but also employees of educational institutions. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 519 (1982). "[I]f it had wished to restrict the scope of [Title IX]," the Court explained, "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person.'" *Id.* at 521. Similarly, the en banc Tenth Circuit rejected the argument that "a government employee who obtains information about fraud in the scope of his or her employment and who is required to report that fraud is not a 'person' entitled to bring a civil action under [the False Claims Act]." *United States ex rel. Holmes*

v. Consumer Ins. Grp., 318 F.3d 1199, 1208-11 (10th Cir. 2003) (en banc).

The same reasoning applies here. First assistants, PAS officers, and GS-15 employees are all "persons" within the meaning of Section 3345(b)(1). Indeed, Section 3346(a)—which, much like Section 3345(b)(1), refers to a "person serving as an acting officer ... under section 3345"—indisputably applies to all categories of acting officers. 5 U.S.C. § 3346(a); *see also id.* § 3346(b)(1), (b)(2); *id.* § 3349(a)(2). If Congress had intended to refer only to first assistants in Section 3345(b)(1), it would have been far more natural to substitute "first assistant" for "person."

b. Congress's use of "this section" likewise confirms that the "persons" referred to in Section 3345(b)(1) include all acting officers. It is well established that the phrase "this section" refers to the entire section in which it appears. In subdividing statutory sections, Congress normally adheres to a hierarchical scheme. *See* L. Filson, *The Legislative Drafter's Desk Reference* 222 (1992). Drafting manuals prepared by the legislative counsel's office in the House and the Senate provide that sections should be subdivided into "subsections (starting with (a))," "paragraphs (starting with (1))," "subparagraphs (starting with (A))," and "clauses (starting with (i))." *House Legislative Counsel's Manual on Drafting Style*, HLC No. 104-1, p. 24 (1995); *see* Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 10 (1997).

Courts interpret statutes in accordance with this hierarchical scheme. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-62 (2004) (approvingly

citing House and Senate drafting manuals and distinguishing between Congress's use of "subparagraph" and "clause"); *Perry v. First Nat'l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (distinguishing between Congress's use of "section" and "subsection"); *United States v. Mills*, 140 F.3d 630, 633 (6th Cir. 1998) (distinguishing between Congress's use of "section" and "subparagraph"); *Estate of Flanigan v. Comm'r*, 743 F.2d 1526, 1530 (11th Cir. 1984) (distinguishing between Congress's use of "section" and "paragraph"). And because this Court is "generally reluctant to give the same words a different meaning when construing statutes," it is particularly important to give hierarchical terms their ordinary meaning when Congress uses them repeatedly throughout a statute. *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 2001 (2015); *see Perry*, 459 F.3d at 820-21.

These principles confirm that Section 3345(b)(1) applies to all officers acting under Section 3345—not just those acting under Subsection (a)(1). "Throughout the FVRA, Congress was precise in its use of internal cross-references." Pet. App. 12a; *e.g.*, 5 U.S.C. § 3345(a)(3)(B) ("subparagraph (A)"); *id.* § 3345(b)(2) ("Paragraph 1"); *id.* § 3346(a)(2) ("subsection (b)"); *id.* § 3347(a) ("Sections 3345 and 3346"). Congress knew how "to refer to something less than a whole section" when it wanted to. *Kitsap*, 816 F.3d at 559. Conversely, Congress's use of the phrase "this section" elsewhere in the FVRA plainly refers to the entire section in which it appears. *See, e.g.*, 5 U.S.C. § 3348(a), (e). If Congress intended for Subsection (b)(1) to apply only to acting officers serving under Subsection (a)(1), it would have

referred to a person (or, better yet, a first assistant) serving "under Subsection (a)(1)"; it would not have said "this section," a term that, both elsewhere in the FVRA and as a matter of established drafting practice, has a broader meaning. *Kitsap*, 816 F.3d at 559.

c. The introductory phrase, "notwithstanding subsection (a)(1)," underscores the breadth of the words that follow it. That phrase makes clear that Subsection (b)(1) applies even when another rule directly conflicts with its prohibition. It does not limit the scope of "a person" or "this section," nor does it mean that Subsection (b)(1) applies only "for purposes of" or "with respect to" Subsection (a)(1).

The ordinary meaning of "notwithstanding" is "in spite of," or "without prevention or obstruction from or by." Webster's Third New International Dictionary 1545 (1986); *see* Oxford English Dictionary 556 (2d ed. 1989) ("[i]n spite of"); Black's Law Dictionary (10th ed. 2014) (same); *see also* The Chicago Manual of Style § 5.220 (16th ed. 2010). Thus, "a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override" any specified conflicting provisions. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *see also, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460 (6th Cir. 2010); Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 126-27 (2012).

Consider, for example, Congress's use of "notwithstanding" in Subsection (a):

> (1): "[T]he first assistant to the [vacant] office ... shall perform the functions and duties of the office temporarily in an acting capacity[.]" 5 U.S.C. § 3345(a)(1).
>
> (2): "[N]otwithstanding paragraph (1), the President (and only the President) may direct a [PAS officer] to perform the functions and duties of the vacant office temporarily in an acting capacity[.]" *Id.* § 3345(a)(2).

Subsection (a)(1)'s self-executing rule directly conflicts with Subsection (a)(2). The "notwithstanding" clause resolves this conflict by making clear that Subsection (a)(2) applies *in spite of* Subsection (a)(1)'s mandate. But Subsection (a)(2) does not apply only "for purposes of" or "with respect to" Subsection (a)(1); to the contrary, it applies even when Subsection (a)(1) does not apply at all. For example, when there is no first assistant position in the first place (as is the case for many of the positions identified in the Government's appendix), an acting officer may still serve pursuant to Subsection (a)(2). *See, e.g.*, Pet. Br. App. 16a-17a nn.23-24, 25a-26a nn.37-40, 64a-65a nn.90-91. The "notwithstanding" clauses in Subsections (a)(3) and (c)(1) function the same way. *See* 5 U.S.C. § 3345(a)(3), (c)(1).

The "notwithstanding" clause also plays the same role in Section 3345(b)(1). When the President nominates a short-serving, non-PAS first assistant to the permanent position, Section 3345(a)(1) says that such person "shall" automatically serve as the acting officer; Section 3345(b)(1) says the same person "may not" serve as the acting officer. *Id.* § 3345(a)(1), (b)(1). The "notwithstanding" clause resolves this

conflict by making clear that Section 3345(b)(1)'s restrictions override Section 3345(a)(1)'s mandate. But as with Congress's other usages of the phrase, it does not mean that Section 3345(b)(1) applies *only* where Section 3345(a)(1) applies. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."); *see also infra* 37-44 (responding to Government's attempt to rewrite Section 3345(b)(1) using the "notwithstanding" clause).

B. Interpreting Section 3345 To Apply To All Acting Officers Avoids Superfluity In The Surrounding Text

"It is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). As both the D.C. and Ninth Circuits recognized, construing Section 3345(b)(1) to apply to first assistants, PAS officers, and senior government employees avoids superfluity in the surrounding text. *See* Pet. App. 15a; *Kitsap*, 816 F.3d at 560.

First, interpreting Section 3345(b) to apply to all acting officers avoids rendering Subsection (b)(2) entirely superfluous. Subsection (b)(2) creates an exception to Subsection (b)(1)'s prohibition by allowing first assistants with less than 90 days of experience to serve as both the acting officer and the permanent nominee if the first assistant position is itself a PAS position and "the Senate has approved the appointment of such person to such office." 5 U.S.C. § 3345(b)(2). There would be no need to carve

out this exception if Section 3345(b)(1)'s general prohibition applied only to first assistants serving pursuant to Subsection (a)(1). The President could simply direct a nominee who is a Senate-confirmed first assistant to serve as the acting officer pursuant to Subsection (a)(2) (which, according to the Government, is not constrained by Subsection (b)(1)). *See id.* § 3345(a)(2).

In fact, Congress added Subsection (b)(2)'s language only after expanding Subsection (b)(1) to reach all acting officers. The initial draft bill—which included language "manifestly appl[ying] [Section 3345(b)(1)] to first assistants only," Pet. App. 19a—did not include Subsection (b)(2) at all. *See* S. 2176 at 3. It did not need to: Until Congress expanded Section 3345(b)(1)'s reach, Senate-confirmed first assistants could serve as acting officers under Subsection (a)(2) even if they were also the permanent nominee.

Second, the D.C. and Ninth Circuits' interpretation of Section 3345(b)(1) also gives meaning to the exception in Section 3345(b)(2)(A) for a Senate-confirmed "person [who] is serving as the first assistant to the office of an officer described under subsection (a)." If Section 3345(b)(1)'s reference to "a person" included only first assistants, there would be no need for Subsection (b)(2)(A) to state the requirement that a person be serving as a first assistant: "[T]he current first assistant—whether he became first assistant before or after the vacancy—is *necessarily* serving as a first assistant." Pet. App. 16a. Indeed, by equating "person" with "first assistant," the Government reads Subsection (b)(2)(A) to apply to "a first assistant" who "is serving as the

first assistant." The Government claims that Congress sought to "state with completeness the criteria for application of Subsection (b)(2)." Pet. Br. 35. But that is no explanation because Congress did *not* restate Subsection (b)(1)'s other central requirement: that the acting official also have been nominated for the permanent position. *See* 5 U.S.C. § 3345(b)(1)(B).

Finally, interpreting Section 3345(b)(1) to apply only to first assistants could render the condition in Subsection (b)(1)(A)(i)—that the person "'did not serve in the position of first assistant to the office'" in the prior 365 days—"inoperative" as well. Pet. App. 16a (quoting 5 U.S.C. § 3345(b)(1)(A)(i)). Although neither court needed to reach the question, both the D.C. and Ninth Circuits noted that "subsection (a)(1) may refer [only] to the person who is serving as first assistant *when the vacancy occurs*." Pet. App. 15a; *see Kitsap*, 816 F.3d at 560. If this interpretation is correct—a question on which the Government has flip-flopped[5]—Subsection (b)(1)(A)(i) could never be satisfied because the first assistant at the time of the vacancy "*necessarily* served as the first assistant in the previous year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560. By contrast, interpreting Section

[5] In the same memorandum on which the Government relies for its interpretation of Section 3345(b)(1), OLC concluded that "the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer [under Section 3345(a)(1)]." Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63-64 (1999). OLC later determined that its "initial understanding was erroneous" and reversed course. Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

3345(b)(1) to reach all acting officers avoids superfluity because "many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560.

C. The FVRA's History And Purpose Further Support Respondent's Interpretation Of Section 3345(b)(1)

The history and purpose of the FVRA further confirm that Section 3345(b)(1) applies to all acting officers.

1. Congress's primary objective in enacting the FVRA was to reclaim the Senate's role under the Appointments Clause. *See supra* 11. In the years leading up to the FVRA's enactment, Presidents repeatedly used acting service as a way to put their ultimate choice for a vacant position to work, immediately and for a prolonged period, without the Senate's approval. *See supra* 8-10. This threatened to "obliterate[] the constitutional requirement that the officer serve only after the Senate confirms the nominee." S. Rep. No. 105-250 at 7.

This prolonged service often occurred because the President installed his chosen replacement as an acting officer without ever submitting a nomination at all. *See supra* 8-9. But not always. *See supra* 9-10. And whether or not the President has publicly nominated his chosen replacement, the core problem with that individual's acting service remains the same. In either case, the President has installed his chosen officeholder to perform the duties of a PAS office without obtaining the Senate's approval.

The FVRA addresses these concerns by requiring the President to identify his chosen replacement promptly, *see* 5 U.S.C. § 3346(a), and by generally preventing that individual from starting work in his proposed new role without first obtaining the Senate's advice and consent, *see id.* § 3345(b)(1).

At the same time, the FVRA ensures that the government can continue to run smoothly until the Senate approves a permanent officeholder. Congress allowed the President to choose from a specified pool of competent caretakers—first assistants, PAS officers, and senior agency employees—to serve as acting officials throughout the potentially lengthy confirmation process. *See id.* §§ 3345(a), 3346. And when it comes to the acting officers *most* competent to keep the agency running—experienced or Senate-confirmed first assistants—the FVRA even creates an exception to the bar on acting service by nominees. *See id.* § 3345(b)(1)(A), (b)(2). But this exception is appropriately limited. Congress did not want to recreate the core problem that led to the FVRA in the first place, by allowing acting service to become an avenue for the President to put his chosen replacement to work before the Senate approves.

2. An example illustrates why interpreting Section 3345(b)(1) to prohibit acting service by nominees serving under Subsections (a)(2) and (a)(3) advances the FVRA's objectives.

Because the FVRA allows an acting officer to serve throughout the time a nomination is pending, the President's chosen replacement could potentially serve for years, if the President selects that person from the hundreds of PAS officials in unrelated

agencies, or the potentially thousands of GS-15 employees in the same agency. After designating his chosen replacement to begin acting service immediately, the President could wait 210 days to name that person as a nominee. *See* § 5 U.S.C. § 3346(a)(1). The acting officer could continue to serve while his nomination is pending (as long as two years) and, if the nomination fails, for 210 more days. *See id.* § 3346(a)(2), (b)(1). On the 210th day, the President could renominate his same chosen replacement, who could continue to serve throughout that second confirmation process—and if the second nomination fails, for 210 days after that. *Id.* § 3346(b)(1)-(2).

In other words, the President need only select his chosen replacement from the vast pool of PAS officers or GS-15 employees, and he can then immediately install that person for prolonged acting service regardless of the Senate's views. Even if the Senate *rejects* that person for the permanent position (and even if it does so twice), the President's ultimate choice may still serve as the acting officer for 630 days on top of however long the Senate takes to consider his nominations—a period that could easily equal the President's entire four-year term. Not even the Vacancies Act would have allowed that. *See* Pub. L. No. 100-398, § 7(b), 102 Stat. at 988 (imposing restrictions on acting service by nominees the Senate had rejected). Certainly the FVRA does not.

Interpreting Section 3345(b)(1) to apply to all acting officers closes this potential loophole for circumventing the Senate's advice and consent. Once the President identifies and nominates his chosen replacement—which Section 3346(a)(1) requires him

to do promptly—that person (aside from the very narrow exception in Section 3345(b)) cannot perform the duties of the vacant office until the Senate confirms him.

D. Background Constitutional Principles Favor Interpreting Section 3345(b)(1) To Apply To All Acting Officers

Finally, interpreting Section 3345(b)(1) to apply to all acting officials is consistent with the background constitutional principle that "Officers of the United States" require the Senate's advice and consent. U.S. Const., art. II, § 2, cl. 2.

1. "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. The Framers required "the Advice and Consent of the Senate" to ensure that the Executive would be "accountable to political force and the will of the people" when making appointments. *Freytag*, 501 U.S. at 884. The Appointments Clause accordingly is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). However, as with other checks and balances, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag*, 501 U.S. at 880.

The Constitution's structural protections frequently guide this Court in interpreting statutes. *Kucana v. Holder*, for example, involved a provision in the Illegal Immigration Reform and Immigrant

Responsibility Act depriving courts of jurisdiction to review certain discretionary actions by the Attorney General. 558 U.S. 233, 237 (2010). The Court construed this provision narrowly, stressing that "[s]eparation-of-powers concerns ... caution us against reading legislation, absent a clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Id.*; *see id.* at 252.

Other cases likewise recognize the Constitution's various structural safeguards as a "background principle[] of construction." *Bond v. United States*, 134 S. Ct. 2077, 2088-90 (2014) (construing ambiguous statute in light of "basic principles of federalism embodied in the Constitution"); *see, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (interpreting term "agency" in Administrative Procedure Act in light of "the separation of powers and the unique constitutional position of the President"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67 (1989) (rejecting statutory interpretation that would disregard traditional balance between the States and the Federal Government).

2. The same principles support construing Section 3345(b)(1) to apply to all acting officers. By allowing temporary officials to perform important government functions that are otherwise reserved to Senate-confirmed "Officers of the United States," the FVRA departs from the constitutional "norm." *See Noel Canning*, 134 S. Ct. at 2558. That departure should be construed narrowly. *See Kucana*, 558 U.S. at 237; *Bond*, 134 S. Ct. at 2088-90; *Franklin*, 505 U.S at 800-01; *Will*, 491 U.S. at 66-67. If Section 3345(b)(1) applied only to first assistants, any

nominee from among the hundreds of PAS officers in unrelated agencies, or the potentially thousands of GS-15 employees within an agency, would be able to begin performing those functions immediately under the guise of acting service. By contrast, if Section 3345(b)(1) applies to all acting officials, only one nominee—the long-serving or Senate-confirmed first assistant to the vacant office—can do so. Separation-of-powers concerns favor the latter interpretation, lest Section 3345(b)(1) "obliterate[] the constitutional requirement that the officer serve only after the Senate confirms the nominee." S. Rep. No. 105-250 at 7.

II. THE GOVERNMENT'S CONTRARY ARGUMENTS ARE UNAVAILING

The Government nevertheless attempts to rewrite Section 3345(b)(1)'s unambiguous text. All relevant authority refutes the Government's assertion that the introductory clause "notwithstanding subsection (a)(1)" limits the broad words that follow it. The Government's interpretation likewise finds no support in the FVRA's history and purpose. Nor is the Government entitled to rewrite the FVRA based on the Executive Branch's previous disregard for the statutory text.

A. The "Notwithstanding" Clause Does Not Restrict The Broad Language That Follows It

The Government's sole textual argument is that "notwithstanding subsection (a)(1)" means that Section 3345(b)(1) applies *only* to Subsection (a)(1). According to the Government, Congress's failure to include Subsections (a)(2) and (a)(3) in the

"notwithstanding" clause indicates that it did not intend for Section 3345(b)(1) to apply to those provisions at all. This argument falters at every step.

1. "Notwithstanding" clauses do not restrict a provision's scope. Instead, they emphasize a provision's breadth by making clear that it applies even when another rule directly conflicts. *See supra* 27-28. That is how "notwithstanding" clauses are used elsewhere in Section 3345. *See id.* By ascribing a limiting function to "notwithstanding subsection (a)(1)," it is the Government—not Respondent—that creates inconsistency in the FVRA's use of "notwithstanding." *See* Pet. Br. 30.

The Government cites no authority for the notion that a "notwithstanding" clause narrows a provision's scope so that it applies only where a specified conflicting rule would otherwise govern. Numerous cases repudiate that view. For example, the Negotiated Rates Act, 49 U.S.C. § 10701(f), allows a motor carrier's bankrupt estate to recover amounts that the carrier unlawfully undercharged shippers. *See In the Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 623 (7th Cir. 1995). Section 10701(f)(9) provides: "Notwithstanding paragraphs (2), (3), and (4)," which set forth options for some shippers to settle the claims against them, the bankruptcy estate may not recover from small businesses. 49 U.S.C. § 10701(f)(9). Several courts have rejected the argument that "the bar created by [Section 10701(f)(9)] applies *only* where the settlement options listed in [paragraphs (2), (3), and (4)] would apply." *Lifschultz*, 63 F.3d at 631; *see, e.g.*, *In re Bulldog Trucking, Inc.*, 66 F.3d 1390, 1397 (4th Cir. 1995); *In re Jones Trucking Lines, Inc.*, 57 F.3d 642, 648 (8th

Cir. 1995). Rather, Section 10701(f)(9) bars recovery against even those small businesses that are not eligible to settle the claims against them under paragraphs (2), (3), and (4). *See Lifschultz*, 63 F.3d at 631.

Similarly, Section 1322(e) of the Bankruptcy Code, 11 U.S.C. § 1322(e), requires a Chapter 13 debtor to include in his plan the interest, costs, and fees imposed by the underlying debt agreement, "notwithstanding" a separate provision allowing only oversecured creditors to recover such amounts. Relying on the "notwithstanding" clause, the debtor in *Deutsche Bank National Trust Co. v. Tucker* argued that Section 1322(e)'s requirement applied only to oversecured creditors and not to under- or unsecured creditors. *See* 621 F.3d at 462. The Sixth Circuit disagreed, explaining that the debtor's argument "conflicts with the plain language of [Section 1322(e)]," which applies whether or not a creditor is oversecured. *Id.* at 463, 465.

Here, Section 3345(b)(1)'s "notwithstanding" clause makes clear that Section 3345(b)(1) overrides Section 3345(a)(1)—but it does not mean "that (b)(1) applies *only* to (a)(1)." *Kitsap*, 816 F.3d at 559. Had Congress intended that result, it would have introduced Section 3345(b)(1)'s broad independent clause by saying "for purposes of" or "with respect to" Subsection (a)(1). Such limiting dependent clauses have a meaning different from "notwithstanding." Pet. App. 13a. Indeed, Congress's use of the phrase "[f]or purposes of" elsewhere in Section 3345 confirms that "it knew how to use limiting language when it wanted to." Pet. App. 15a (citing 5 U.S.C.

§ 3345(c)(2)); *see also* 5 U.S.C. § 3346(a)(2) ("subject to subsection (b)").

2. Invoking the canon *expressio unius exclusion alterius*, the Government nevertheless insists that Congress's decision to specify "notwithstanding subsection (a)(1)" indicates that Congress did not intend for Section (b)(1) to apply to Subsections (a)(2) and (a)(3). *See* Pet. Br. 28. But as the Government's authorities confirm, that canon "depends on identifving a series of two or more things that should be understood to go hand in hand." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also, e.g., Lindh v. Murphy*, 521 U.S. 320, 329 (1997). It is inapposite here, where critical differences between Subsection (a)(1) and Subsections (a)(2)-(3) readily explain Congress's decision to single out Subsection (a)(1) in the "notwithstanding" clause.

Subsection (a)(1) sets forth a mandatory, self-executing rule. When a vacancy arises, the first assistant automatically becomes the acting officer. This rule creates a stark conflict with Section 3345(b)(1). When the President nominates a short-serving, non-PAS first assistant to the permanent position, that person is already serving as the acting officer because Subsection (a)(1) says that he "shall" do so; Subsection (b)(1) says he "may not." 5 U.S.C. § 3345(a)(1), (b)(1). Far from being superfluous (*see* Pet. Br. 37), Section 3345(b)(1)'s "notwithstanding" clause resolves this conflict by making clear that Section 3345(b)(1)'s restrictions override Section 3345(a)(1)'s mandate.

By contrast, there is no conflict between Section 3345(b)(1) and Subsections (a)(2) and (a)(3) that

warrants including them in the "notwithstanding" clause. Subsections (a)(2) and (a)(3) are not self-executing rules that trigger immediate results; they are permissive provisions that grant the President discretion. That discretion is not boundless, and Section 3345(b)(1) delineates it. Section 3345(b)(1) notifies the President from the outset that his decision to nominate certain individuals for the permanent position will disqualify those individuals from acting service. But that does not create a conflict with Subsections (a)(2) or (a)(3). After all, no single subsection, paragraph, or subparagraph, standing alone, provides the complete picture of the President's discretion to designate acting officers; Section 3345, as a whole, does so.

Section 3345 is not unusual in this regard. Congress frequently confers broad discretion in one subsection and then limits it in another. In such circumstances, a "notwithstanding" clause is unnecessary; the two provisions are naturally read together and harmonized.

For example, under 14 U.S.C. § 211(a)(1), "[t]he President may appoint permanent commissioned officers in the Regular Coast Guard in grades appropriate to their qualification, experience, and length of service, as the needs of the Coast Guard may require, from among" specified categories of individuals. While that subsection grants the President discretion to make appointments, Subsection (b) limits it—without the use of a "notwithstanding" clause. It states that "[n]o person shall be appointed a commissioned officer under this section until [he satisfies criteria established by the Secretary]." *Id.* § 211(b).

Similarly, under 10 U.S.C. § 408(a), "[t]he Secretary of Defense may provide assistance to *any* foreign nation to assist the Department of Defense with recovery of and accounting for missing United States Government personnel." (emphasis added). Subsection (c) limits the Secretary's discretion—again, without using a "notwithstanding" clause—by stating that "[a]ssistance may *not* be provided under this section to any foreign nation unless the Secretary of State specifically approves the provision of such assistance." *Id.* § 408(c) (emphasis added); *see also* 10 U.S.C. § 401(a)(1), (b) (similar); *id.* § 407(a)(1), (b)(1) (similar).

Likewise, the Administrator of FEMA "may pay a bonus to an individual in order to recruit the individual for a position within the Agency that would otherwise be difficult to fill in the absence of such a bonus." 5 U.S.C. § 10104(a). Subsequent subsections constrain that discretion by prohibiting the payment of a bonus to certain individuals, *id.* § 10104(d); conditioning its payment, *id.* § 10104(c); and capping its amount, *id.* § 10104(b)(1)—all without the use of a "notwithstanding" clause. Many other statutes follow a similar pattern. *See, e.g.*, 10 U.S.C. § 14703(a), (b); 14 U.S.C. § 500(a), (b); 42 U.S.C. § 8814(a), (b)(1); *id.* § 8832(a), (b)(1)(A), (c).

The Government acknowledges that the operation of Subsections (a)(2) and (a)(3) "is not automatic," but claims that, once the President exercises his discretion under them, "those subsections are just as categorical as Subsection (a)(1) in directing the specified official to perform the office's functions and duties." Pet. Br. 32. This argument incorrectly presumes that the President has unfettered

discretion under Subsections (a)(2) and (a)(3). As explained above, however, the President's discretion to appoint someone other than the first assistant as an acting official has to be understood in light of Section 3345 as a whole. Subsections (a)(2) and (a)(3) are no more freestanding grants of discretion than the provisions in other statutes described above, which must be read in light of adjacent limitations.

The Government's argument also assumes that the President always designates an individual to act under Subsections (a)(2) or (a)(3) *before* nominating that person for the permanent position. That is wrong, and only highlights another way in which Subsections (a)(2) and (a)(3) differ from Subsection (a)(1). Subsection (a)(1)'s self-executing rule means that the first assistant will serve as the acting officer before the President can nominate anyone. By contrast, the Government's own appendix confirms that the President routinely directs PAS officers and GS-15 employees to serve as acting officers *after* nominating them for the permanent position. *See* Pet. Br. App. A (nearly one-third of nominees were designated as the acting officer after or on the same day as their nomination). In other words, the President often chooses a nominee first and an acting officer second. Section 3345(b)(1) makes clear that the first decision may affect his discretion regarding the second. Again, that is not a conflict; it is simply a boundary on discretion.

In sum, given that Subsection (a)(1) *alone* creates a true conflict with Section 3345(b)(1), it makes sense that Congress included that provision—and no others—in the "notwithstanding" clause. It is therefore no surprise that Congress chose not to use

the "common formulation" "notwithstanding any other provision of law." Pet. Br. 31. Indeed, in addition to being unnecessary, that broad formulation would have risked overriding alternative vacancy-filling mechanisms that the FVRA expressly preserves. *See* 5 U.S.C. § 3347(a)(1)(A); S. Rep. No. 105-250 at 16-17; *see also* Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* 256 (2006) (Broadly worded "notwithstanding" clauses "might end up disregarding too many laws or too few[.]").

3. Nothing else in Section 3345 supports the Government's interpretation of Section 3345(b)(1).

First, the Government argues that the term "a person" includes first assistants serving under Subsection (a)(1). *See* Pet. Br. 33-34. But that is no reason to read Subsection 3345(b)(1) to apply only to first assistants. PAS officials are people, too. So are GS-15 employees. In fact, Congress used the word "person" throughout the FVRA to refer to all three types of acting officials. *See, e.g.*, 5 U.S.C. § 3346(a), (b)(1), (b)(2); *id.* § 3349(a)(2).

When Congress wanted to refer to only a subset of acting officials, it made that clear by including unmistakable qualifying language. *See, e.g.*, *id.* § 3345 (a)(2) ("a person who serves in [a PAS position]"). The Government sees such qualifying language in Section 3345(b)(1)'s requirement that a nominee serve as the first assistant for at least 90 days in the year preceding the vacancy. *See* Pet. Br. 33. But the fact that this requirement "would very rarely *be satisfied* by a person not serving as first

assistant," *id.* (emphasis added), says nothing about who is *subject to* the requirement in the first place.

Second, the Government claims that the phrases "a person" and "this section" should be given the same meaning that they had in the initial draft bill, which applied only to first assistants. Pet. Br. 34. But Congress deleted the language limiting the unenacted draft of Section 3345(b)(1) to first assistants, replacing it instead with language that encompasses all categories of acting officials. *See supra* 13-14. That deletion of limiting language only undermines the Government's reading of the statute that Congress actually enacted. *See Doe v. Chao*, 540 U.S. 614, 623 (2004).

Finally, interpreting Section 3345(b)(1) to apply to all acting officers does not create a conflict with Subsection (c)(1). *See* AFL-CIO Amicus Br. 12-13. Subsection (c)(1), which addresses certain term-limited PAS positions, extends an existing officeholder's term by allowing him "to continue to serve in that office," "without a break in service," while his nomination for an additional term is pending. 5 U.S.C. § 3345(c)(1). That continued service is unlike the acting service described in Subsection (a), by individuals who "perform the functions and duties of the [vacant] office temporarily in an acting capacity." *Id.* § 3345(a)(1)-(3). Section 3345(b)(1) accordingly does not apply to individuals serving under Subsection (c)(1) at all. And even if it did, Subsection (c)(1)'s narrow permission and Subsection (b)(1)'s general prohibition can easily be harmonized. *Cf. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the

specific governs the general."). By contrast, Subsection (a)(1)'s self-executing rule creates a stark conflict with Subsection (c)(1)'s discretionary provision. *See supra* 27-28.

* * *

If Congress had wanted to apply Section 3345(b)(1)'s prohibition to first assistants only, it had numerous ways of doing so. Congress could have said, "a first assistant may not serve as an acting officer for an office under Subsection (a)(1)." Or it could have begun Section 3345(b)(1) with the phrase "for purposes of Subsection (a)(1)." It even could have included Section 3345(b)(1)'s prohibition in Subsection (a)(1) (just as it included restrictions specific to agency employees in Subsection (a)(3)). What Congress would *not* have done is to specify that a broad prohibition applies "notwithstanding" Subsection (a)(1). That phrase cannot bear the weight that the Government ascribes to it.

B. The Government's Caricatured Account Of The FVRA's History And Purpose Does Not Warrant Departing From Section 3345(b)(1)'s Clear Text

The Government next looks to the FVRA's purpose and history to overcome Section 3345(b)(1)'s clear language. But that background supports Respondent's interpretation. *See supra* 32-35. And even if it did not, "the most formidable argument concerning the statute's purposes could not overcome" its unambiguous text. *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012). The Government's evidence of legislative intent is "anything but" formidable. Pet. App. 17a.

1. The Government first claims that interpreting Section 3345(b)(1) to apply to all acting officers is at odds with "the FVRA's objective of providing the President with a measure of added flexibility in acting designations." Pet. Br. 39. But flexibility was not the FVRA's primary objective—in fact, it was just the opposite. In response to decades of Presidential circumvention of the Senate's advice-and-consent role, Congress sought to *constrain* the President's ability to staff vacancies with his chosen replacement without obtaining the Senate's approval. *See supra* 8-10, 32-33. To the extent a few Senators were concerned about flexibility, it was largely because they believed that "[Congress's] understandable desire to protect the Senate's constitutional prerogatives," as reflected in the initial draft of the FVRA, went too far. S. Rep. 105-250 at 30 (additional views); *see supra* 12.

Moreover, flexibility was not even the only driving force behind the changes that Congress made to the initial draft of Section 3345(b)(1). *See supra* 12-14, 32-34. The Government claims that the revisions to Section 3345(b)(1) were intended solely to "reduce[] from 180 to 90 days the time-in-service requirement ... for first assistants who are also nominees." Pet. Br. 46. But if that were so, Congress would have simply replaced "180 days" with "90 days," without making substantial other changes. Indeed, Congress did just that in Section 3346. *Compare* S. 2176 at 3-4 *with* 5 U.S.C. § 3346. The Government offers no explanation for Congress's additional changes to Section 3345(b)—including its elimination of language limiting Subsection (b)(1) to first assistants, and its addition of a provision (Subsection

(b)(2)) that would be unnecessary if Subsection (b)(1) applied only to first assistants.

In any event, interpreting Section 3345(b)(1) to apply to all acting officers does not meaningfully constrain the President's flexibility. It removes just *one* person from the pool of eligible acting officers—the permanent nominee—and only if that person is not a long-serving or Senate-confirmed first assistant. *See Kitsap*, 816 F.3d at 563; Pet. App. 19a-20a. The Government protests that even this limitation is too much because it would force an acting officer to cease his acting service "precisely because [he] ha[s] been deemed most competent to fill the position[] permanently." Pet. Br. 40. But the Government's own evidence confirms that the President routinely directs individuals to begin w rk under the guise of acting service *after* nominating them. *See* Pet. Br. App. A (nearly one-third of nominees were designated as the acting officer after or on the same day as their nomination). And that is exactly the sort of flexibility that Congress did not want the President to have. *Cf. Lee Press Release*, 1997 WL 770918 at *4 ("I have done my best to work with the United States Senate in an entirely constitutional way," but "we had to get somebody into the Civil Rights Division.").

2. The Government next insists that Congress's sole concern about acting service by nominees related to newly appointed first assistants, not PAS officials or senior agency employees. *See* Pet. Br. 38, 42. That argument mischaracterizes the impetus for the FVRA, and it is belied by the statutory scheme that Congress enacted.

Congress was troubled by the circumstances surrounding Bill Lann Lee's nomination and acting service because they exemplified the broader problems leading to the FVRA's enactment. The President designated Lee to serve as the acting officer long after the Vacancies Act's 120-day limit had expired. *See CRS Validity Memo* 2. And because he did so after the Senate refused to confirm Lee for the permanent position, Lee's acting service was a particularly egregious example of the core concern behind the FVRA: the decades-long circumvention and "obliterat[ion] [of] the constitutional requirement that the officer serve only after the Senate confirms the nominee," S. Rep. No. 105-250 at 7; *see Vacancies Act Hearing* 4.

The Government emphasizes a particular aspect of Lee's acting service: that he was brought in from the private sector to serve as the first assistant after the vacancy arose. *See* Pet. Br. 7, 38, 42. But if Congress had been concerned about acting service by newly appointed first assistants, it would have imposed a length-of-service requirement in Section 3345(a)(1). Yet, according to the Government, those individuals are free to serve as acting officials. *See* Pet. Br. 36. Instead of restricting acting service by newly appointed first assistants, Congress chose to restrict acting service by *nominees*. *See* 5 U.S.C. § 3345(b)(1). That choice confirms that Congress actually was concerned about all nominees starting work under the guise of acting service without the Senate's consent—not just newly appointed first assistants.

And indeed, it makes sense that Congress would have been concerned about acting service by all nominees given that the FVRA allowed more people

to serve as acting officers, and for longer periods of time, than previous vacancies statutes. In fact, it was in the course of revising the FVRA to extend acting service from 150 to 210 days, and to allow the potentially thousands of GS-15 employees within an agency to serve as acting officers, that Congress expanded Section 3345(b)(1)'s reach by deleting language that limited its restriction to first assistants. *Compare* S. 2176 at 3 *with* 5 U.S.C. § 3345(b)(1)(A). That deletion can be "fairly seen ... as a deliberate elimination" of any such limitation on Section 3345(b)(1). *Doe*, 540 U.S. at 623; *see also* Pet. App. 19a; *Kitsap*, 816 F.3d at 563. It is also consistent with Congress's pattern of expanding the President's power to fill vacancies in one respect, while also contracting it in another. *See supra* 4-7.

3. The Government claims that interpreting Section 3345(b)(1) to apply to all acting officers is unnecessary to protect the Senate's advice-and-consent role because Subsections (a)(2) and (a)(3) already contain sufficient safeguards. *See* Pet. Br. 42-43. The Government is wrong again.

There are more than 1,200 PAS positions across dozens of agencies. *See* H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions app. 1, at 200 (Comm. Print 2012). These positions involve different skill sets, areas of expertise, and types of responsibility The range of PAS positions includes, for example, the Attorney General, Secretary of Defense, NASA Administrator, Federal Mine Safety and Health Review Commission members, and National Council on the Humanities members. Senate confirmation for one of these positions is hardly a proxy for the Senate's consent to

the same individual's service in an entirely different PAS office. And even when positions require similar skill sets, the Senate's consent is not transferrable: A district court judge's unanimous confirmation is no guarantee that the Senate will approve the same individual's nomination to a court of appeals.

Likewise, there are thousands of GS-15 employees, many of whom are hired from outside the Government each year. In 2005, for example, the Government filled more than 3,000 positions at the GS-15 level with external applicants. Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government*, at 9 (2008), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118&version=323564&application=ACROBAT. Service in a particular agency for at least 90 days during the year preceding a vacancy may make an individual competent to keep things running when a vacancy arises. *See* 5 U.S.C. § 3345(a)(3). But it is no substitute for Senate approval before a nominee begins work in a high-level PAS position under the guise of acting service.

The Government's assertion that applying Section 3345(b)(1) to all acting officers "would result in strange asymmetries" ignores the critical differences between a long-serving or Senate-confirmed first assistant and the thousands of individuals holding unrelated PAS or GS-15 positions. Pet Br. 41. As already noted, such first assistants are the acting officials most competent to keep the agency humming. And as nominees, they are the least likely to represent a change to the status quo. There is

nothing odd about Congress's decision to allow these individuals—and no others—to continue to serve in an acting role even when nominated for the permanent position.

Finally, the Government claims that the FVRA should not be interpreted to restrict PAS officeholders' ability to serve simultaneously as acting officers and nominees because the Vacancies Act had allowed them to do so. *See* Pet. Br. 39, 43 n.5. But Congress enacted the FVRA's comprehensive reforms because the Vacancies Act had proved inadequate. Indeed, a first assistant's ability to serve as both the acting official and the nominee was equally well established, and yet the FVRA indisputably restricts it. *See* 5 U.S.C. § 3345(b)(1). There is nothing surprising about Congress also restricting the ability of other acting officers to serve when nominated. That is especially true because the pool of eligible acting officers had grown dramatically in the 130 years between the passage of the FVRA and the Vacancies Act.

4. The only aspect of the FVRA's history that even arguably supports the Government's position is a single sentence on the Senate floor by Senator Thompson. *See* Pet. Br. 47-48 (quoting 144 Cong. Rec. 27,496 (daily ed. Oct. 21, 1998)). But Senator Thompson's comment "is not the only statement on the subject." *Kitsap*, 816 F.3d at 562.

Senator Byrd, "an original sponsor of the [FVRA]," offered a comprehensive analysis of Section 3345 that directly contradicts Senator Thompson's statement. 144 Cong. Rec. 27,497-98 (statement of Sen. Byrd). Using language that "hew[s] much more closely to the

statutory text," Pet. App. 18a, Senator Byrd explained:

> Section 3345 applies when an officer dies, resigns or is otherwise unable to perform the functions and duties of the office. ... Should one of these situations arise, the officer's position may then be filled temporarily by either: (1) the first assistant to the vacant office; (2) an executive officer who has been confirmed by the Senate for his current position; or (3) a career civil servant, paid at or above the GS-15 rate, who has served in the agency for at least 90 of the past 365 days. *However, a person may not serve as an acting officer if:* (1)(a) *he is not the first assistant*, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2) the President nominates him to fill the vacant office.

144 Cong. Rec. 27,498 (statement of Sen. Byrd) (emphasis added).

Quoting Senator Byrd's last sentence in isolation, the Government dismisses his analysis as "vague language" that "offers little guidance" because it "does not specifically mention Subsections (a)(2) or (a)(3)." Pet. Br. 48. But Senator Byrd described the operation of all of Section 3345 in detail in the immediately preceding sentences. And it is hard to imagine a clearer statement than "a person may not serve as an acting officer if he is not the first assistant."

The Government also claims that Senator Byrd's statement is less authoritative than Senator

Thompson's because "Senator Byrd was not the author of the language he was addressing." *Id.* Senator Thompson himself acknowledged, however, that "Senator Byrd ... is really in many ways the author of this legislation." 144 Cong. Rec. 22,507 (statement of Sen. Thompson). And in any event, the Government's own authorities confirm that "a sponsor's statement to the full Senate carries considerable weight." *Corley v. United States*, 556 U.S. 303, 318 (2009).

C. The Government's Reliance On Executive Practice Does Not Withstand Scrutiny

In a final effort to rewrite Section 3345(b)(1)'s clear text, the Government turns to the Executive Branch's practice under the FVRA. But neither of the statements on which that practice is based withstands scrutiny. And there is no evidence that the Senate knew about, much less approved of, the Executive's misinterpretation of the FVRA.

1. The Government relies heavily on statements from OLC and GAO to support the Executive Branch's "longstanding interpretation" of the FVRA. *E.g.*, Pet. Br. 14, 50. The Government does not claim, however, that these statements are entitled to *Chevron* deference. Nor could it. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (OLC "advisory opinions" are "not an administrative interpretation that is entitled to deference under *Chevron*[.]"). Neither OLC nor GAO has been "appointed to carry [the FVRA's] provisions into effect." *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827). And while the Government emphasizes

that GAO plays a "role in the FVRA's enforcement scheme," Pet. Br. 50, that role is limited to reporting violations of Section 3346's time limits, *see* 5 U.S.C. § 3349(b)—a separate (and far simpler) question than compliance with Section 3345(b)(1).

In any event, the OLC memorandum contains no analysis of the FVRA's text; it simply states that Section 3345(b)(1)'s limitation applies only to first assistants. *See* 23 Op. O.L.C. at 64. This approach contravenes OLC's own "best practices," which require it to use traditional tools of statutory construction and to consider competing viewpoints in order to ensure advice that is "clear, accurate, thoroughly researched, and soundly reasoned." *See* U.S. Dep't of Justice, Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), http://goo.gl/g2OIVu. In fact, OLC subsequently repudiated one of the conclusions it reached in this same "question and answer" memorandum, explaining that it "did not thoroughly consider" the issue and its "initial understanding was erroneous." 25 Op. O.L.C. at 179. OLC's unreasoned understanding of Section 3345(b)(1) is equally deficient.

The GAO letter is even less enlightening. Although it notes that first assistants are subject to Section 3345(b)(1), it says nothing about whether those limits also apply to other acting officials. *See* Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*,

GAO-01-468R, at 2-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf.

These documents hardly represent a "clear and contemporaneous record of how the [FVRA] was understood by" the Executive or Congress (Pet. Br. 50), and are entitled to no deference.

2. The Government contends that the Senate ratified or acquiesced to the Executive Branch's interpretation of the FVRA because it did not object when nominees for a vacant PAS position simultaneously served as acting officers under Subsections (a)(2) or (a)(3). *See* Pet. Br. 51. The Government is wrong.

a. As an initial matter, there is no evidence that the Senate was aware of the Executive Branch's flawed interpretation. The Government claims that a nominee's acting service and prior positions are part of the record before the Senate when it considers nominees. However, none of the evidence it cites (Pet. Br. 52-54 & n.7) specifies that a particular individual was acting under the FVRA (as opposed to one of the 40 other statutes that provide independent, alternative avenues for installing acting officers, *see* S. Rep. No. 105-250 at 16-17), much less that he was doing so pursuant to Subsections (a)(2) or (a)(3). After all, a first assistant's actual job title varies across agencies and positions, and is seldom if ever discernible on its face.

These determinations are not easy. Even the Government has had trouble making them. In its petition for certiorari, the Government identified only 14 nominees who served in violation of the D.C. Circuit's interpretation of Section 3345(b)(1). *See* Pet.

5-6, 10. It took several more months for the Government to complete its analysis—which revealed at least one error in the Government's earlier determinations. *See* Pet. Br. 16 n.3. That analysis also required consulting with at least 11 different agencies (including to determine which position, if any, was the first assistant to each vacant office). *See, e.g.*, Pet. Br. App. 2a-3a nn.3-4, 16a-17a nn.23-24, 19a-20a nn.29-20, 54a n.75. The Government's own arduous efforts belie its assumption that the Senate knew that any of the nearly 20,000 nominees it has considered since the FVRA's enactment were serving in violation of Section 3345(b)(1), much less that the Senate approved the Executive Branch's flawed interpretation.

b. Moreover, even if the Senate had been aware of an individual's improper acting service, it had no obligation to reject otherwise-qualified nominees on that basis. Section 3345(b)(1) prohibits acting service by a permanent nominee. But nothing in the FVRA disqualifies an unauthorized acting officer from the permanent position. And it is hard to imagine why the Senate would reject a nominee of whom it approves. Doing so would only prolong the vacancy—and allow a temporary official who has not received the Senate's consent to keep performing important government functions.

The Government also claims that Congress could have "quickly correct[ed]" the Executive Branch's flawed interpretation by passing new legislation. Pet. Br. 25. But the FVRA itself—which the Government cites as an example of Congress's vigilance in "safeguard[ing] its prerogatives concerning appointments," Pet. Br. 50—was a response to

widespread abuses that had persisted for *25 years*. *See CRS Validity Memo* 4; *Vacancies Act Hearing* 10-13. It is hardly probative that Congress has not enacted new legislation within the FVRA's shorter lifespan, particularly given that Section 3345(b)(1)'s clear text already refutes the Executive Branch's interpretation. *Cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

c. Against this backdrop, the Government's reliance on *Noel Canning* is misplaced. There is no question that Congress was well aware of the "thousands of intra-session recess appointments" at issue in *Noel Canning*. 134 S. Ct. at 2562. Unlike acting service in violation of Section 3345(b)(1), the fact of a recess appointment is obvious. *See, e.g.*, The White House, Office of the Press Secretary, "President Obama Announces Recess Appointments to Key Administration Posts," 2012 WLNR 179638 (Jan. 4, 2012). Moreover, only 112 individuals have served in violation of Section 3345(b)(1)—approximately 0.6% of the nearly 20,000 nominees the Senate has considered since the FVRA's enactment. *See* Pet. Br. App. A. That makes these individuals unlike the "thousands" of intra-session recess appointees at issue in *Noel Canning*, and more like the 160-plus "historical examples of recess appointments made during inter-session recesses shorter than 10 days": "scattered examples" better "regard[ed] ... as anomalies." *Noel Canning*, 134 S. Ct. at 2567; *see id.* at 2563.

In addition, the Executive Branch's practice under the FVRA for 18 years is not comparable to a settled practice under the Constitution that dates back to

"the beginning of the Republic." *Id.* at 2560. Historical practice is particularly useful to decipher constitutional provisions because of the broad "'terms & phrases necessarily used in such a charter.'" *Id.* (quoting Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)). But when it comes to a statute, its plain text controls. *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 121-22 (1994) (60 years of administrative practice cannot overcome clear text).

d. Congress also has not ratified or acquiesced to the Executive Branch's flawed interpretation. To the contrary, several Senators have repudiated it. *See* Pet. Br. 54 n.8; Pet. 28-29. And although the Government claims that these objections came too late, *see* Pet. Br. 20, 54, "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible," *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969).

Indeed, "legislative silence" does not amount to approval. *United States v. Wells*, 519 U.S. 482, 495-96 (1997); *see Alexander v. Sandoval*, 532 U.S. 275, 292, (2001) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation."). That is because "several equally tenable inferences may be drawn from such inaction," *Central Bank*, 511 U.S. at 187—including "unawareness, preoccupation, or paralysis," *Zuber*, 396 U.S. at 185 n.21.

Accordingly, "[t]his Court has many times reconsidered statutory constructions that have been passively abided by Congress." *Id.* For example,

Brown rejected the argument that "Congress's legislative silence as to [an agency's] regulatory practice over the last 60 years serves as an implicit endorsement of [the agency's] policy." 513 U.S. at 120-21. And *Solid Waste Agency v. U.S. Army Corps of Engineers* repudiated an agency's claim that Congress "approved [its] ... expansive definition of 'navigable waters'" when Congress "fail[ed] to pass legislation that would have overturned" its regulations. 531 U.S. 159, 168-69 (2001). *Central Bank* similarly held that Congress did not "acquiesce[] in [lower courts'] judicial interpretation" of § 10(b) of the Securities Exchange Act when it amended the law without "overturn[ing] [the] statutory precedent." 511 U.S. at 186. *See also, e.g., Rapanos v. United States*, 547 U.S. 715, 750-751 (2006) (plurality op.) (Congress's failure to act on agency interpretation is not acquiescence; it is a "failure to express any opinion[.]").[6]

The same is true here. Congress's silence regarding the meaning of Section 3345(b)(1) does not mean that it approved of the Executive Branch's interpretation—especially when there is no "evidence to suggest that Congress was even aware of the [Executive's] interpretative position" in the first place. *Brown*, 513 U.S. at 121.

3. At bottom, the Government argues that its interpretation should prevail because the Executive

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[6] *Watson v. United States*, 552 U.S. 74, 82-83 (2007), did not rely on congressional acquiescence to interpret a statute in the first instance. It merely observed that Congress's failure to modify a 14-year-old decision from this Court counseled in favor of *stare decisis*. *See id.*

Branch has gotten away with it for 18 years. But just as "[a] regulation's age is no antidote to clear inconsistency with a statute," *id.* at 122, the Government "may not insulate itself from correction merely because it has not been corrected soon enough," *Summit Petroleum Corp. v. E.P.A.*, 690 F.3d 733, 746 (6th Cir. 2012). That "sort of [18]-year adverse possession ... deservedly has no precedent in [this Court's] jurisprudence." *Rapanos*, 547 U.S. at 752 (plurality op.).

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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